

APPENDIX

CONTRIBUTION OF THE UNITED STATES TO THE IMPROVEMENT OF THE
DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO RELATED TO TRANSPARENCY

INTRODUCTION

The Uruguay Round of multilateral trade negotiations was able to achieve agreement on a wide range of new disciplines designed to reduce barriers to trade while recognizing the legitimate needs of Members to pursue policy objectives. Those new disciplines reached areas of government action additional to those areas that had traditionally been the subject of trade disciplines. Members also agreed on a new dispute settlement system in order to help resolve problems arising from the application of these World Trade Organization (“WTO”) disciplines.

Experience under the WTO dispute settlement system since 1995 has demonstrated that the recommendations and rulings of the Dispute Settlement Body can affect large sectors of civil society. At the same time, increased membership in the WTO has also meant that more governments and their citizens have an interest in those recommendations and rulings. Yet civil society and Members not party to a dispute have been unable even to observe the arguments or proceedings that result in these recommendations and rulings.

Other international dispute settlement fora and tribunals are open to the public, such as the International Court of Justice,¹ the International Tribunal for the Law of the Sea,² the International Criminal Tribunal for the former Yugoslavia,³ the International Criminal Tribunal for Rwanda,⁴ the European Court of Human Rights,⁵ and the African Court on Human and Peoples’ Rights.⁶ Those fora deal with issues that are intergovernmental in nature and are at least as sensitive as those involved in WTO disputes. For example, these fora have addressed boundary disputes, use of force, nuclear

¹Article 59, Rules of Court.

²Article 74, Rules of the Tribunal.

³Rule 78, Rules of Procedure and Evidence.

⁴Rule 78, Rules of Procedure and Evidence.

⁵Rule 33, Chapter 1, Title II, Rules of Court.

⁶Article 10, On the Establishment of an African Court of Human and Peoples’ Rights, Protocol to the African Charter on Human and Peoples’ Rights.

weapons, human rights violations, and genocide.

There is no reason why the WTO should be different in this respect. The public has a legitimate interest in the proceedings. WTO trade disputes, like other intergovernmental disputes, could benefit from being more transparent to the public. Indeed, implementation of the DSB recommendations and rulings may be facilitated if those being asked to assist in the task of implementation, such as the constituencies of legislators, have confidence that the recommendations and rulings are the result of a fair and adequate process.

At the same time, non-party WTO Members would benefit from being able to observe the arguments and proceedings of WTO disputes.⁷ This would assist Members, including developing countries, in understanding the issues involved as well as gaining greater familiarity and experience with dispute settlement. Being better informed about disputes generally could aid Members in deciding whether to assert third party rights in a particular dispute.

A more open and transparent process would be a significant improvement to the DSU, in keeping with the commitment by Ministers “to promote a better public understanding of the WTO,” and “to making the WTO’s operations more transparent, including through more effective and prompt dissemination of information.”⁸ Such a more open and transparent process could be achieved by providing an opportunity to observe the arguments and evidence submitted in proceedings as well as observing those proceedings, subject to appropriate safeguards such as for confidential information and security. In addition, the final results of those proceedings should be made available to the public as soon as possible. The following proposals are intended to help achieve such a more open and transparent process. In no case are these proposals designed to afford Members fewer or more limited rights than those available to civil society.

1) OPEN MEETINGS

The DSU should provide that the public may observe all substantive panel, Appellate Body and arbitration⁹ meetings with the parties except those portions dealing with confidential information (such as business confidential information or law enforcement methods). The DSU could provide a basic set of procedures for this purpose with some flexibility for the relevant body to refine these in light of the particular circumstances of a specific proceeding. For example, the procedures could provide a number of options for allowing the public to observe the meetings, such as broadcasting meetings to special viewing facilities.

2) TIMELY ACCESS TO SUBMISSIONS

⁷ We note that other Members have expressed an interest in this.

⁸ Paragraph 10 of the Doha Ministerial Declaration.

⁹ This would include arbitration under Articles 21.3(c), 22.6, and 25 of the DSU.

The DSU should provide that parties' submissions and written versions of oral statements in panel, Appellate Body, or arbitration proceedings are public, except those portions dealing with confidential information.

To help facilitate public access to these documents, the Secretariat should maintain them in a central location that would be responsible for making these documents available to the public.

3) TIMELY ACCESS TO FINAL REPORTS

The WTO should make a final panel report available to WTO Members and the public once it is issued to the parties, although only circulation would trigger the relevant DSU deadlines.

4) AMICUS CURIAE SUBMISSIONS

In light of the experience to date with *amicus curiae* submissions to panels and the Appellate Body, Members may wish to consider whether it would be helpful to propose guideline procedures for handling *amicus curiae* submissions to address those procedural concerns that have been raised by Members, panels and the Appellate Body.

The United States would welcome discussing these proposals with any Member that is interested, including discussion of the particular details involved in putting any of these proposals into effect. In addition, the United States looks forward to working with Members on others means to improve the DSU.

NEGOTIATIONS ON IMPROVEMENTS AND CLARIFICATIONS OF THE DISPUTE SETTLEMENT UNDERSTANDING

Contribution by Chile and the United States

ON IMPROVING FLEXIBILITY AND MEMBER CONTROL IN WTO DISPUTE SETTLEMENT

In DSB discussions to date on the DSU, Members have re-emphasized that the central objective of the dispute settlement system should be the prompt resolution of disputes between parties. For that reason, Members have emphasized both the importance of ensuring that dispute settlement procedures facilitate resolution of a dispute and, as part of this approach, the need for flexibility in the system to allow parties to resolve disputes in a prompt manner. Members have indicated that it is important to retain the flexibility that already exists in the system. Members have also identified that there are areas that could benefit from additional flexibility.

At the same time, while Members have acknowledged the general effectiveness of the DSU, there have been concerns that some limitations in the current procedures may have resulted, in some cases, in an interpretative approach or legal reasoning applied by WTO adjudicative bodies (ie panels, the Appellate Body and arbitrators) that could have benefitted from additional Member review. Members have not always, during proceedings or in the adoption process for reports, had a full opportunity to ensure that the findings of the adjudicative bodies will contribute to resolving the disputes.

The WTO dispute settlement system is almost unique in that adoption of panel and Appellate Body reports is quasi-automatic under the reverse consensus rule. However, the reasoning and findings of reports may at times go beyond what the parties consider to be necessary to resolve the dispute, or, in some circumstances, may even be counter-productive to resolution of the dispute. It is proposed that there should be mechanisms that would enhance the parties' flexibility to resolve the dispute and Members' control over the adoption process.

Accordingly, panel and Appellate Body reasoning and findings should not go beyond those aspects of the dispute that the complainant and respondent parties consider necessary to resolve the dispute. Some Members have indicated that sensitive areas that could have benefitted from additional opportunity for Member discussion and review include, for example:

- a) situations where the relevant WTO text does not address an issue, leading to concerns over

whether an adjudicative body might "fill the gap" and consequently add to or diminish rights and obligations under the relevant agreement instead of clarifying those rights and obligations

- Gaps may reflect a situation where there was a limit upon what negotiators were able to agree. Alternatively, gaps may reflect an absence of any consideration by negotiators of the particular detail at issue
- b) situations in which legal concepts outside the WTO texts have been applied in a WTO dispute settlement proceeding, including asserted principles of international law other than customary international law rules of interpretation (eg state responsibility, proportionality)

Members may wish to consider ways they can provide additional guidance to adjudicative bodies, both in the context of the current negotiations and during individual disputes, including through procedures which strengthen Member control and flexibility. At the same time, Members may wish to consider whether the current DSU provides sufficient assurance that the members of panels have the appropriate expertise to appreciate the issues presented. In doing so, Members can also enhance their ability to resolve disputes at any time in the process.

Proposal for possible options for enhancing dispute settlement:

- a) making provision for interim reports at the Appellate Body stage, thus allowing parties to comment to strengthen the final report.
 - Strengthening reports would be especially useful at the appellate stage, since there is no opportunity for further appeals or argumentation
- b) providing a mechanism for parties, after review of the interim report, to delete by mutual agreement findings in the report that are not necessary or helpful to resolving the dispute, thus continuing to allow the parties to retain control over the terms of reference
- c) making provision for some form of "partial adoption" procedure, where the DSB would decline to adopt certain parts of reports while still allowing the parties to secure the DSB recommendations and rulings necessary to help resolve the dispute
- d) providing the parties a right, by mutual agreement, to suspend panel and Appellate Body procedures to allow time to continue to work on resolving the dispute
 - currently there is no provision for suspending Appellate Body proceedings once they are commenced, and panel proceedings can only be suspended if the panel accepts the request of the complaining party
- e) ensuring that the members of panels have appropriate expertise to appreciate the issues presented in a dispute

- f) providing some form of additional guidance to WTO adjudicative bodies concerning i) the nature and scope of the task presented to them (for example when the exercise of judicial economy is most useful) and ii) rules of interpretation of the WTO agreements.

The Members making this contribution to the negotiations on improvements and clarifications of the Dispute Settlement Understanding look forward to working with other Members on the elaboration of these ideas.